

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34476

JAY NELSON,)	2008 Unpublished Opinion No. 675
)	
Plaintiff-Respondent,)	Filed: October 16, 2008
)	
v.)	Stephen W. Kenyon, Clerk
)	
CONSTRUCTION BACKHOE SERVICES,)	THIS IS AN UNPUBLISHED
INC., an Idaho corporation,)	OPINION AND SHALL NOT
)	BE CITED AS AUTHORITY
Defendant-Appellant,)	
)	
and)	
)	
TWIN LAKES VILLAGE PROPERTY)	
ASSOCIATION, Inc., an Idaho corporation,)	
and DOES 1 - 10, INCLUSIVE,)	
)	
Defendants.)	
)	

Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. Lansing L. Haynes, District Judge.

Judgment in favor of the plaintiff, affirmed.

Law Service, P.A., Coeur d'Alene, for appellant. G. W. Haight argued.

Dean & Kolts, Coeur d'Alene, for respondent. Brian J. Simpson argued.

GUTIERREZ, Chief Judge

Construction Backhoe Services, Inc. (CBSI) appeals from the district court's judgment for the plaintiff, Jay Nelson, in a breach of contract action. We affirm.

I.

FACTS AND PROCEDURE

In September 2004, CBSI entered into a written contract with ACE Paving & Excavation, LLC (ACE) to excavate and install two drain fields at a golf course in Rathdrum, Idaho. The contract price was \$28,700. Because of the configuration of the lot on which the work was to be

performed, one drain field had to be installed before work on the second began. Under the terms of the contract, CBSI was to pay one-half of the contract price in advance with the balance due upon completion of the project. CBSI initially paid ACE a \$14,000 down payment, which was deposited into ACE's bank account.

ACE, owned and organized by Steve Loken, was associated with Nelson, an excavation contractor holding both water and sewer installation licenses. Nelson was not a principal in ACE and held no ownership interest in the company. On behalf of ACE, Nelson began work on the first drain field at the golf course and substantially completed the task in late October or early November 2004.

As installation of the first drain field neared completion, the relationship between Nelson and the principals of ACE, Loken and his wife, turned tempestuous. In early November, they parted ways. Loken then informed CBSI that ACE would not be able to complete the drain field project as Nelson alone held the necessary certification to perform the work. CBSI terminated its contract with ACE.

Faced with its own contractual obligation to the golf course owner to complete the project before spring, CBSI, through Dean Renninger, asked Nelson if he was willing to complete the second drain field for the balance of the contract price, which at the time was \$14,700. Nelson orally accepted the offer and promptly began work. He completed nearly the entire project by early December, save the final grading of the lot which became impossible due to wet weather conditions. At this point, CBSI conveyed to Nelson that its understanding of their agreement was that Nelson would be paid the balance due on the original contract with ACE, *less* whatever outstanding debts were claimed by ACE's suppliers and subcontractors on the first phase of the project. Concerned about the possibility of vendors placing liens on the project, CBSI paid nearly all of the expenses of ACE and Nelson relating to the excavation of the two drain fields. After deducting those outstanding bills and its legal fees incurred to that point, CBSI informed Nelson that the balance owed to him was approximately \$2,000. Nelson disputed this amount in a letter to CBSI dated December 10, 2004. In the letter, Nelson acknowledged that CBSI had directly paid suppliers related to the second drain field and calculated the amount due him to be \$9,883.07, after deduction for the payments to suppliers and a \$500 allocation to Nelson to finish the grading in the spring. CBSI disputed Nelson's calculation and paid him nothing. Nelson filed suit.

After a bench trial, the district court found that the agreement between CBSI and Nelson had been that Nelson would be paid the balance of the contract price for completing the job and that no mention had been made at the time of the contract formation of a condition that all vendors and suppliers would be paid in full before the remaining balance was paid to Nelson. Offsetting two amounts the parties agreed were still due to vendors, as well as \$1,000 to finish the grading, and adding statutory interest, the court calculated the total amount due Nelson to be \$7,383.07. Judgment was rendered in favor of Nelson. CBSI appeals.

II.

ANALYSIS

The review of a trial court's decision after a court trial is limited to ascertaining whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law. *Griffith v. Clear Lakes Trout Co., Inc.*, 143 Idaho 733, 737, 152 P.3d 604, 608 (2007); *Idaho Forest Industries, Inc. v. Hayden Lake Watershed Imp. Dist.*, 135 Idaho 316, 319, 17 P.3d 260, 263 (2000). The trial court's findings of fact will not be set aside unless clearly erroneous. *Griffith*, 143 Idaho at 737, 152 P.3d at 608; *Idaho Forest Industries*, 135 Idaho at 319, 17 P.3d at 263. See I.R.C.P. 52(a). Thus, if the findings of fact are supported by substantial and competent evidence, even if the evidence is conflicting, this Court will not disturb those findings. *Griffith*, 143 Idaho at 737, 152 P.3d at 608; *Idaho Forest Industries*, 135 Idaho at 319, 17 P.3d at 263. In view of the trial court's role to weigh conflicting evidence and testimony and to judge the credibility of witnesses, the trial court's findings of fact will be liberally construed in favor of the judgment entered. *Griffith*, 143 Idaho at 737, 152 P.3d at 608; *Sun Valley Shamrock Resources, Inc. v. Travelers Leasing Corp.*, 118 Idaho 116, 118, 794 P.2d 1389, 1391 (1990). In reviewing a trial court's conclusions of law, however, a different standard applies: this Court is not bound by the legal conclusions of the trial court, but may draw its own conclusions from the facts presented. *Griffith*, 143 Idaho at 737, 152 P.3d at 608; *Idaho Forest Industries*, 135 Idaho at 319, 17 P.3d at 263.

A. Existence of a Contract

CBSI argues there was no contract formed between it and Nelson because there was not substantial evidence to support a finding that there was a "meeting of the minds" between the parties on the price to be paid Nelson for completing the job. Whether there was a formation of a contract--and specifically whether there was a meeting of the minds as to the essential terms of

the contract--is a determination for the trier of fact. *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 237, 159 P.3d 870, 874 (2007); *Gilbert v. City of Caldwell*, 112 Idaho 386, 391, 732 P.2d 355, 360 (Ct. App. 1987); *Rasmussen v. Martin*, 104 Idaho 401, 659 P.2d 155 (Ct. App. 1983).

Formation of a valid contract requires that there be a meeting of the minds as evidenced by a manifestation of mutual intent to contract; this manifestation takes the form of an offer and acceptance. *P.O. Ventures*, 144 Idaho at 238, 159 P.3d at 875; *Inland Title Co. v. Comstock*, 116 Idaho 701, 703, 779 P.2d 15, 17 (1989). In a dispute over contract formation, it is incumbent upon the plaintiff to prove a distinct and common understanding between the parties. *P.O. Ventures*, 144 Idaho at 238, 159 P.3d at 875; *Inland*, 116 Idaho at 703, 779 P.2d at 17. The common and distinct understanding may be express or implied. *Fox v. Mountain West Elec., Inc.*, 137 Idaho 703, 707, 52 P.3d 848, 852 (2002). When consideration supports a distinct and common understanding of the parties, the understanding becomes an enforceable contract. *Day v. Mortgage Ins. Corp.*, 91 Idaho 605, 607, 428 P.2d 524, 526 (1967). A promisee's bargained-for action or forbearance, given in exchange for a promise, constitutes consideration. *Id.* (citing RESTATEMENT, CONTRACTS, § 75 (1932)). Additionally, to be enforceable, an agreement must be sufficiently definite and certain in its terms and requirements so that it can be determined what acts are to be performed and when performance is complete. *Bajrektarevic v. Lighthouse Home Loans, Inc.*, 143 Idaho 890, 892, 155 P.3d 691, 693 (2007).

CBSI argues that no meeting of the minds occurred because Nelson testified his understanding was that he would be paid the full balance remaining on the ACE contract to complete the project and Renninger's testimony was that it was specified at the time of the contract formation that all vendors and suppliers would be paid in full before the remaining balance of the contract would be paid to Nelson. On this point, the trial court made the following relevant finding of fact:

9. The testimony of Plaintiff and Renninger conflict as to whether Renninger, at the time of offering for Plaintiff to complete the contract with ACE for the balance remaining, specified that all vendors and suppliers be paid in full before the remaining balance of the contract be paid to Plaintiff. This Court finds that no such specification was a condition of the agreement between Plaintiff and Defendant.

The court also made these relevant conclusions of law:

1. Plaintiff was not personally obligated on the contract between ACE and Defendant.
2. Plaintiff and Defendant negotiated a new contract in early November, 2004.
3. Under the terms of this oral contract, Plaintiff agreed to finish the second drain field, completing the work covered by the October 4, 2004 contract between ACE and Defendant.
4. The oral contract between Plaintiff and Defendant obligated Defendant to pay Plaintiff \$14,700 upon completion of the project. . . .

As we stated above, the existence of the requisite meeting of the minds is part of the factual determination reserved for the trial court. Here, the trial judge obviously believed Nelson's version of the events leading to the formation of the contract, and specifically his testimony as to the amount CBSI agreed to pay him for completion of the project. And while the trial court did not explicitly state its conclusions regarding its credibility determinations, it is apparent from its conclusions of law that it found Nelson's account more convincing. Considering the evidence as a whole, it is apparent that had Nelson agreed to the terms as recounted by Renninger, not only would he have made no profit, but he would not have even been able to cover his expenses of completing the job. Thus, it would be counterintuitive for Nelson to have accepted the terms proposed by Renninger where he was not bound by the original contract between ACE and CBSI, as he essentially would have lost money in completing the job. CBSI, on the other hand, had an incentive to hire Nelson to complete the work for the remainder of the contract price given that the work needed to be completed before winter and as Renninger testified, "there wasn't time to really go find anybody else to get the job done."

In sum, the record reflects that both parties' versions of the events at issue were presented to the district court and supported by diametrically opposing evidence. It was thus necessary for the district court to make credibility determinations. Those determinations and the resulting findings of fact are supported by substantial, though controverted, evidence and will not be overturned on appeal. *See Hinkle v. Winey*, 126 Idaho 993, 1001, 895 P.2d 594, 602 (Ct. App. 1995); *Mendes Bros. Dairy v. Farmer's Nat'l Bank*, 111 Idaho 511, 513, 725 P.2d 535, 537 (Ct. App. 1986).

B. Exclusion of Testimony

CBSI also argues that it was error for the court to exclude testimony of the Lokens regarding the compensation that Nelson had allegedly received from the initial payment of \$14,000 by CBSI. The district court disallowed the testimony, stating that it was not relevant.

The trial court has broad discretion in the admission of evidence at trial and its judgment will be reversed only where there is an abuse of that discretion. *State v. Howard*, 135 Idaho 727, 731-32, 24 P.3d 44, 48-49 (2001); *State v. Zimmerman*, 121 Idaho 971, 973-74, 829 P.2d 861, 863-64 (1992). Idaho Rule of Evidence 402 provides that irrelevant evidence is not admissible. Rule 401 defines relevant evidence as that having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

CBSI asserts that if allowed, the Lokens would have testified that many of the expenditures from ACE's account, particularly from the \$14,000 deposited in the account from CBSI, were for the personal benefit of Nelson. CBSI contends the Lokens also would have demonstrated that Nelson considered himself to be and acted as though he was a partner in the business and as such, he was not entitled to additional windfall compensation from the CBSI project. We agree with the district court, however, that such testimony was irrelevant as to the crux of the case--whether CBSI breached a contract with Nelson to pay him \$14,700 for completing the job. Both Steven Loken and Nelson unequivocally testified that Nelson was not an "owner" of ACE, thus supporting the district court's conclusion that he was not personally liable for its contractual obligations. As a result, whatever Nelson may have received from ACE in the form of compensation is irrelevant to the terms of the contract entered into between Nelson and CBSI after CBSI terminated its contract with ACE. In other words, the dealings between Nelson and ACE were irrelevant in deciphering the agreement between Nelson and CBSI. Accordingly, the court did not err in excluding the testimony.

C. Sufficiency of the Evidence

CBSI asserts there was not substantial evidence to support the trial court's finding that the value of the unfinished grading was \$1,000. It argues there is "no evidence" to support the trial court's finding that it would cost approximately \$1,000 to complete the job and that irrespective of either Nelson's or Renninger's estimated cost of completing the project, it was undisputed that CBSI paid \$2,775 to another company to complete the job in the spring.

Again, the court here was faced with divergent opinions as to what it would cost to complete the final phase of the project--as well as evidence of what CBSI actually paid to have it done. At trial, Renninger testified that in early December 2004, Nelson had verbally estimated to him the cost of the final grading to be between \$500 and \$1,000. Renninger himself estimated

the cost to be closer to \$2,000 and testified that CBSI eventually paid an unrelated party \$2,775 to finish the job. Renninger stated that he was unsure as to whether he had procured any other bids on the project. Nelson testified at trial that the remaining grading would have cost \$500 to \$1,000 to complete, stating that that was how much he would have charged to finish the work had it not been included in the contract price.

As we discussed above, the district court, as the finder of fact, was entitled to make credibility determinations. It was well-established that Nelson was experienced in his field and Renninger himself testified that he had worked with Nelson in the past and that he performed sound work. That the court decided to credit Nelson's testimony as a reasonable opinion of the cost of the final grading, as opposed to that asserted by Renninger, or actually paid by CBSI, is not clearly erroneous. Such a determination was based on substantial, albeit conflicting, evidence, and we will not overturn it on appeal. *See Hinkle*, 126 Idaho at 1001, 895 P.2d at 602; *Mendes Bros. Dairy*, 111 Idaho at 513, 725 P.2d at 537.

D. Attorney Fees

CBSI requests attorney fees on appeal pursuant to Idaho Code § 12-120(2). However, CBSI is not the prevailing party, and thus we do not grant its request.

Nelson also requests attorney fees on appeal, citing both I.C. § 12-120(3) and § 12-121. Section 12-120(3) provides that:

In any civil action to recover an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.

Section 12-121 states that "in any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties" In *Pass v. Kenny*, 118 Idaho 445, 449-50, 797 P.2d 153, 157-58 (Ct. App. 1990), we said that:

Such an award is appropriate where the appellate court is left with an abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably or without foundation. In particular, an award will be made if an appeal does no more than simply invite the appellate court to second guess a trial court on conflicting evidence, or if the law is well settled and the appellant has made no substantial showing that the lower court misapplied the law, or -- on review of discretionary decisions -- no cogent challenge is presented with regard to the trial judge's exercise of discretion.

(Citations omitted).

Without addressing Nelson's claim under I.C. § 12-120(3), we conclude that he is entitled to recover attorney fees under I.C. § 12-121, given that in this appeal, CBSI challenged the trial court's finding in favor of Nelson, following a court trial where conflicting evidence was presented. In addition, CBSI presented no cogent challenge with regard to the court's exercise of discretion that the Lokens' testimony was not relevant, and thus not admissible. Therefore, we award Nelson attorney fees on appeal.

III. CONCLUSION

The district court did not err in its factual determination that there was a contract formed between Nelson and CBSI for Nelson to complete the project and be paid the remaining amount on the original contract, \$14,700. Nor did the court err in determining that the value of the unfinished grading was \$1,000 or in excluding testimony of the Lukens as to payments received by Nelson from the initial \$14,000 paid to ACE. Therefore, the judgment rendered in favor of Nelson is affirmed. Nelson is awarded costs and attorney fees on appeal.

Judge LANSING and Judge PERRY **CONCUR.**